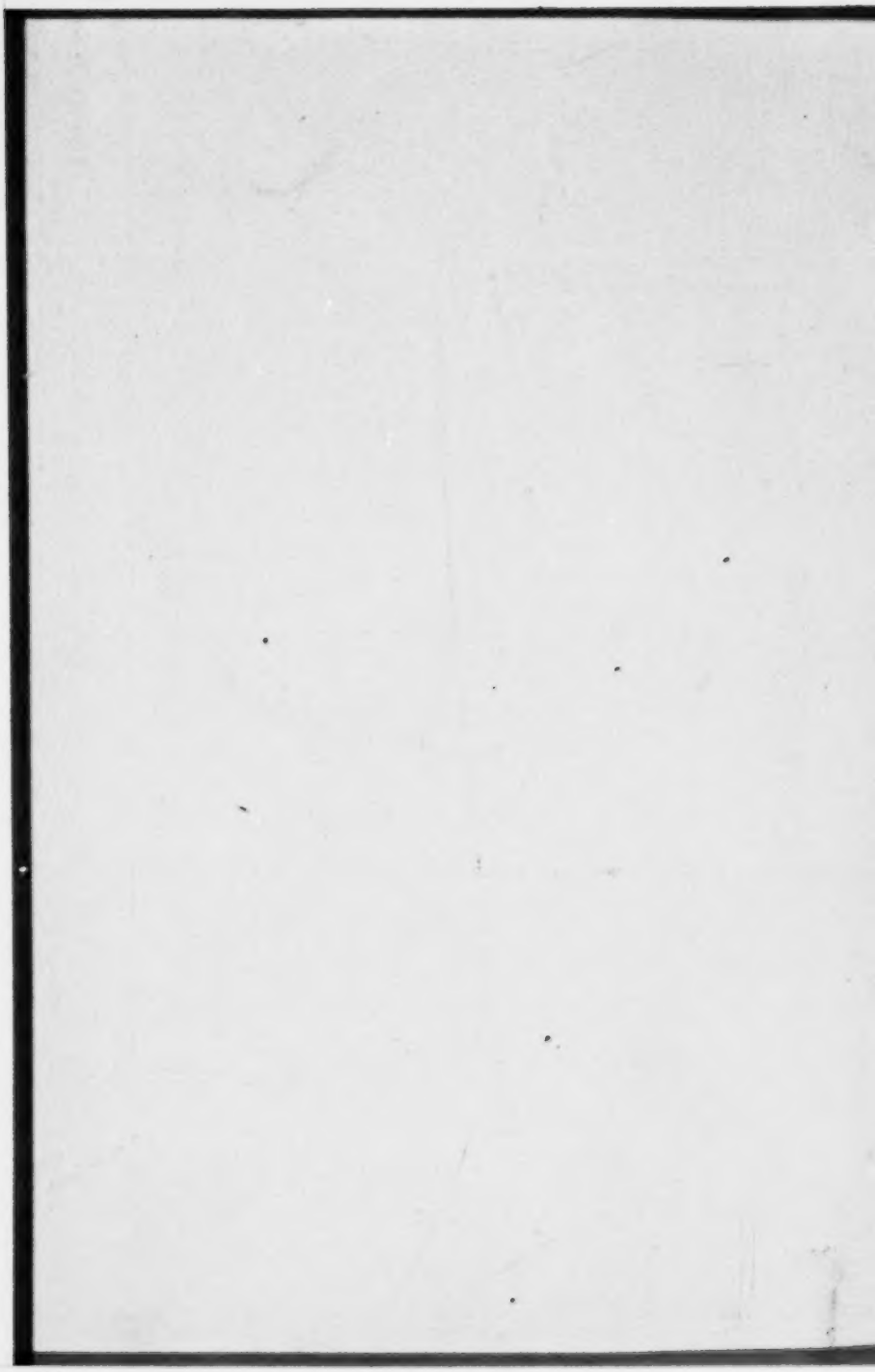

SUPREME COURT OF THE UNITED STATES

FEB 2 1974
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1973

No. 73-235

Marco DeFunis and Betty DeFunis, his wife;
Marco DeFunis, Jr. and Lucia DeFunis, his wife;

Petitioners,

v.

Charles Odegaard, President of the University of Washington; Richard L. Roddis, Dean of the University of Washington Law School; Richard Kummert, Robert T. Hunt and Richard L. Roddis, Admissions Committee of the University of Washington Law School; Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert L. Flennaugh, Jack G. Newpert, Robert F. Philip and George B. Powell, Regents of the University of Washington; and Harold Gardiner, Registrar of the University of Washington.

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF WASHINGTON

BRIEF OF THE DEANS OF THE ANTIOCH SCHOOL OF LAW AS AMICI CURIAE

Submitted by:
EDGAR S. CAHN
JEAN CAMPER CAHN
Deans
Antioch School of Law
1624 Crescent Place, N.W.

IN THE

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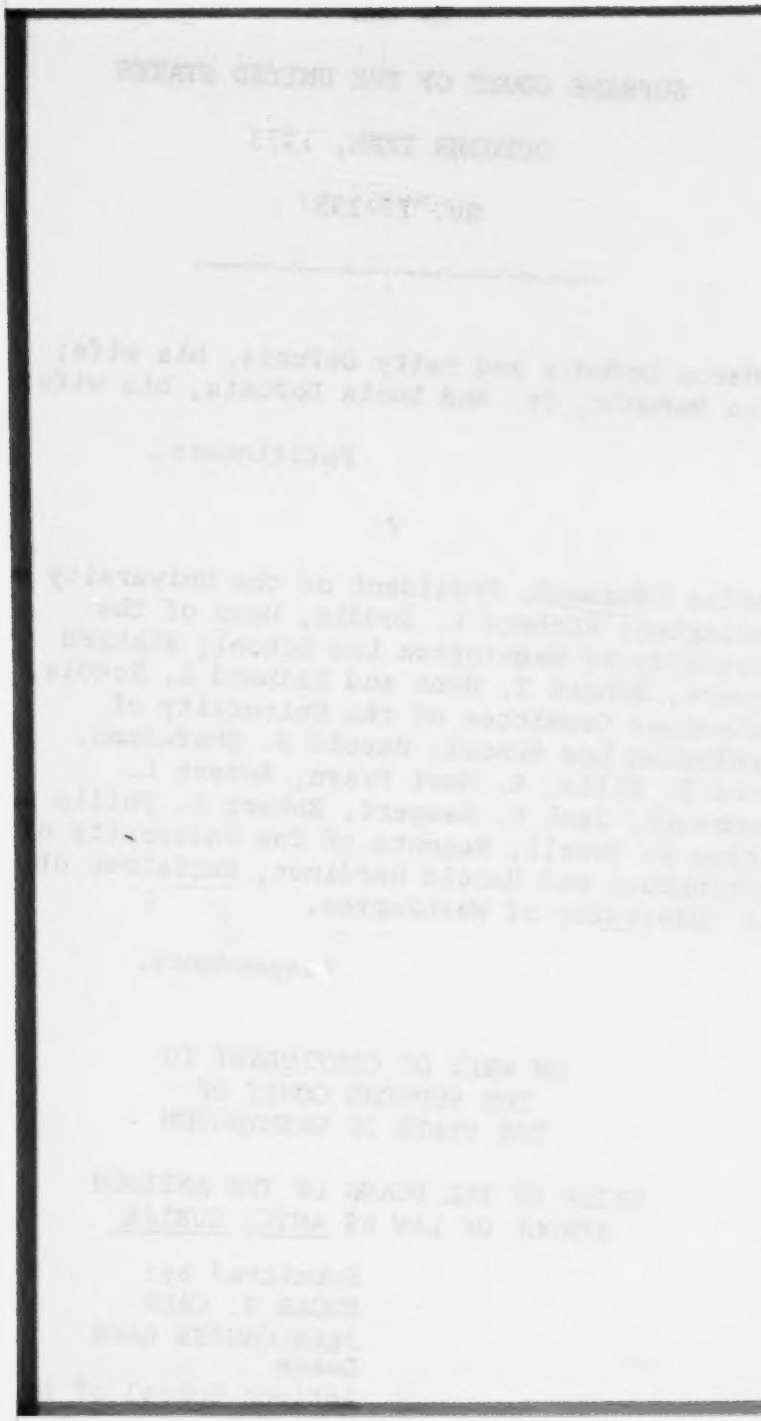

TABLE OF CONTENTS

Interest of the Amici 1

Consent of the Parties 3

Question Presented 4

Argument 5

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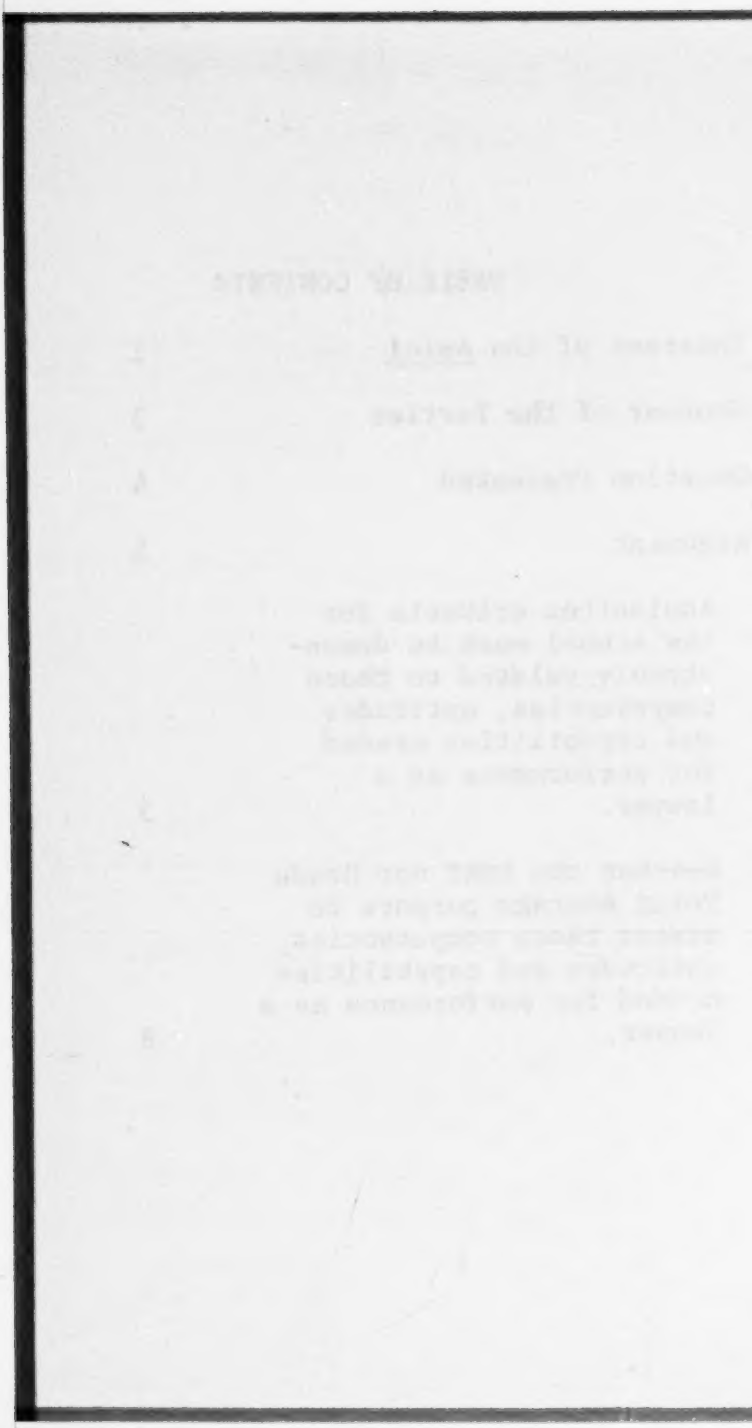
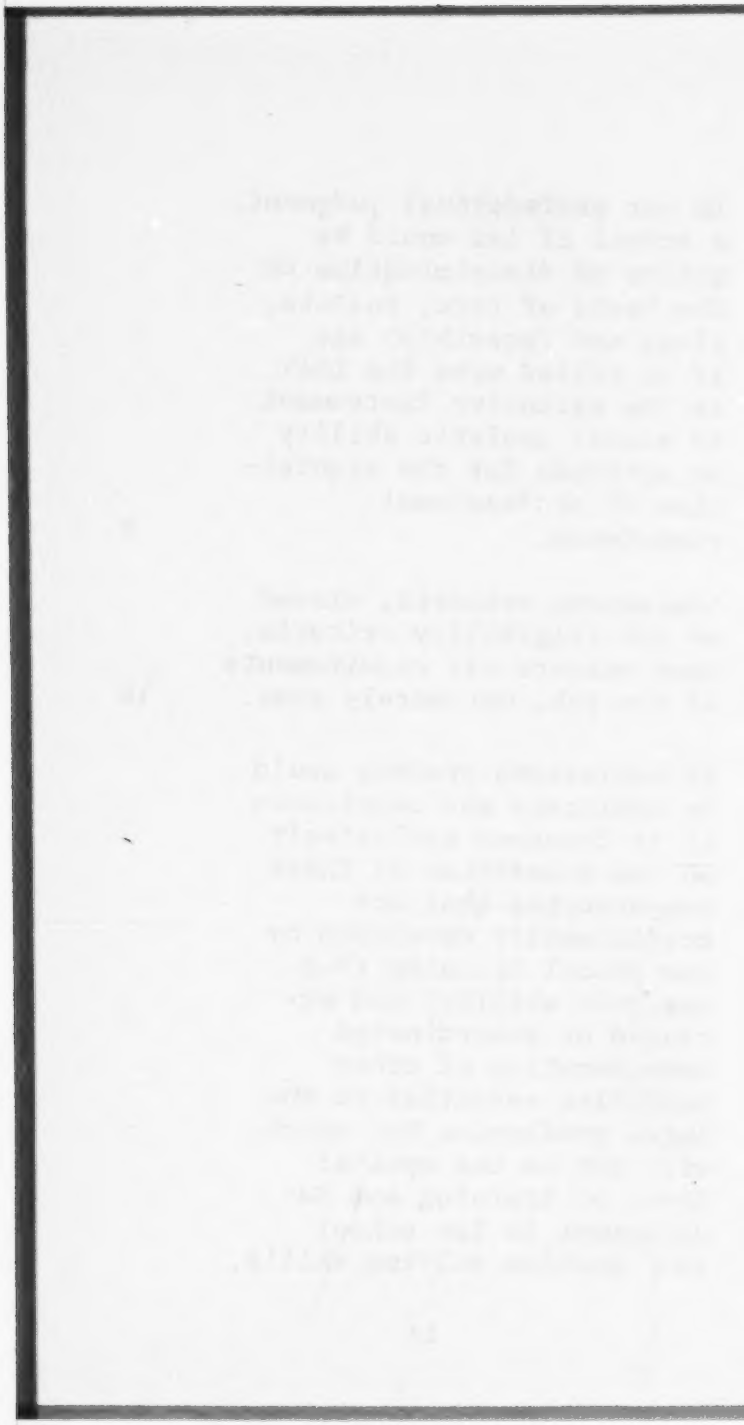


In our professional judgment, a school of law would be guilty of discrimination on the basis of race, culture, class and (possibly) age if it relied upon the LSAT as the exclusive instrument to assess analytic ability or aptitude for the acquisition of professional competence. 9

Admissions criteria, viewed as job eligibility criteria, must measure all requirements of the job, not merely some. 14

An admissions process would be arbitrary and capricious if it focusses exclusively on the possession of those competencies that are traditionally developed by law school training (e.g. analytic ability) and excluded or subordinated consideration of other qualities essential to the legal profession but which will not be the special focus of training and development in law school (e.g. problem solving skills,

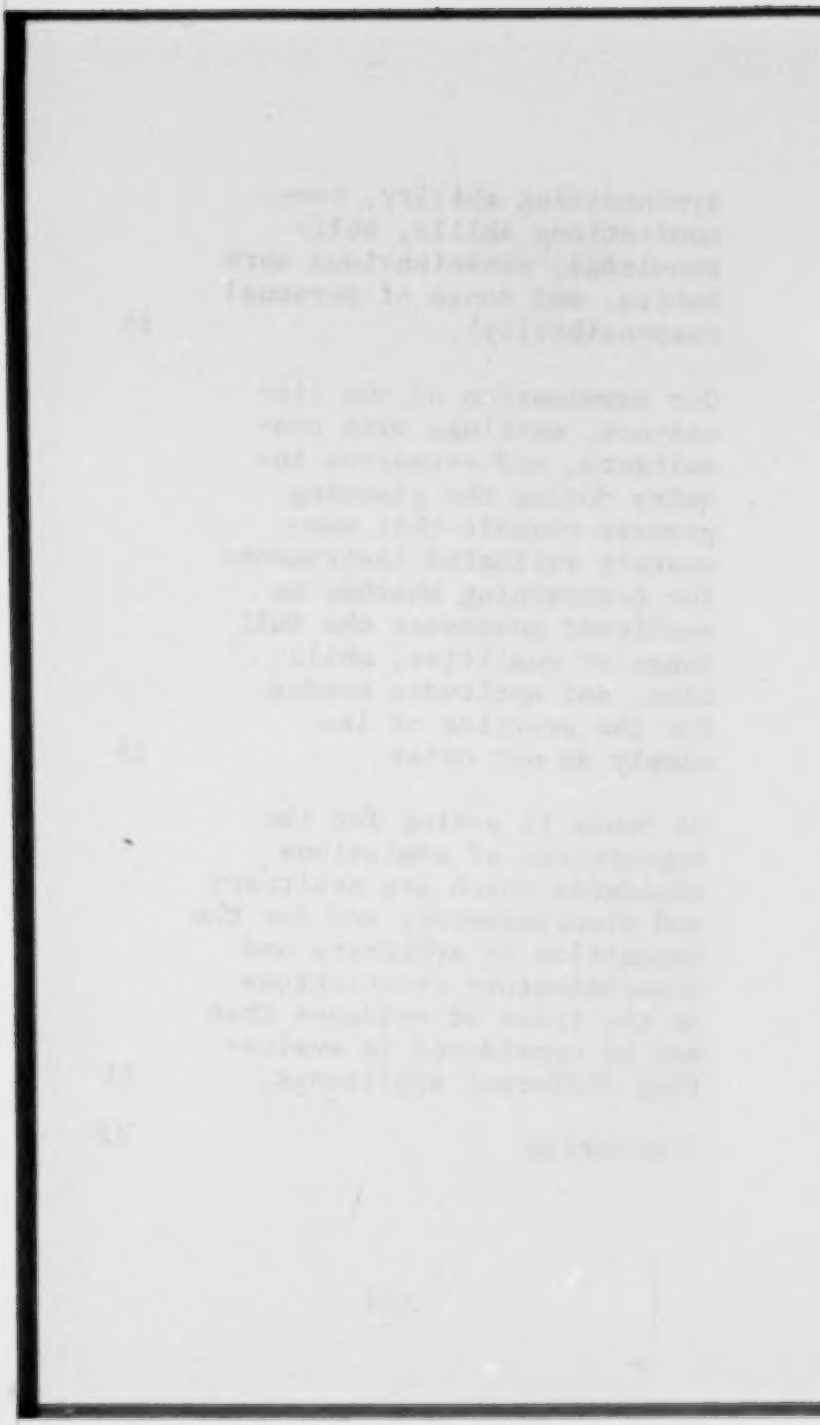


synthesizing ability, communications skills, self-knowledge, conscientious work habits, and sense of personal responsibility). 16

Our examination of the literature, meetings with consultants, and extensive inquiry during the planning process reveals that adequately validated instruments for determining whether an applicant possesses the full range of qualities, abilities, and aptitudes needed for the practice of law simply do not exist. 18

De Funis is asking for the impositions of admissions standards which are arbitrary and discriminatory and for the imposition of arbitrary and discriminatory restrictions on the types of evidence that may be considered in evaluating different applicants. 21

Conclusion 22

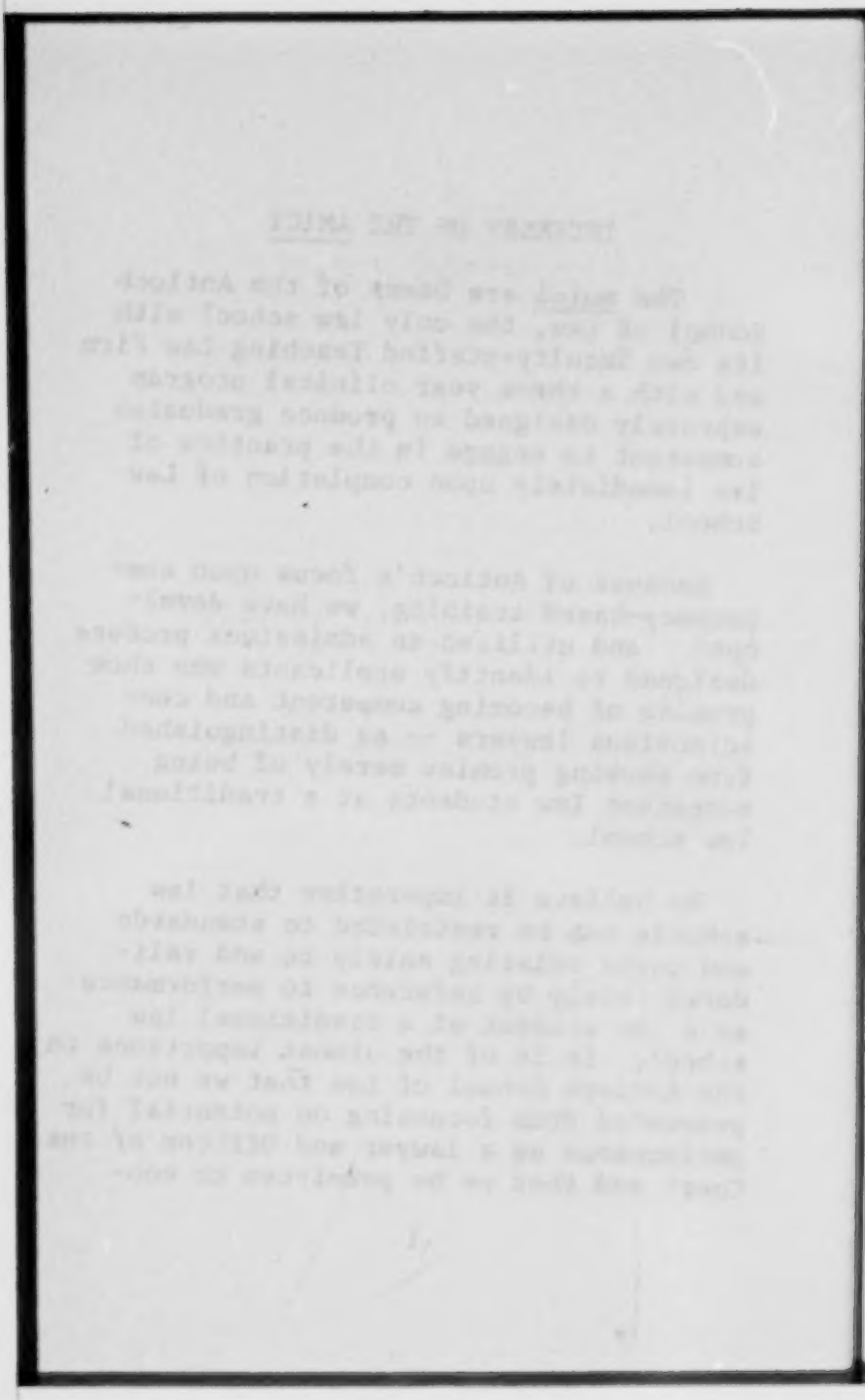


INTEREST OF THE AMICI

The amici are Deans of the Antioch School of Law, the only law school with its own faculty-staffed Teaching Law Firm and with a three year clinical program expressly designed to produce graduates competent to engage in the practice of law immediately upon completion of Law School.

Because of Antioch's focus upon competency-based training, we have developed and utilized an admissions process designed to identify applicants who show promise of becoming competent and conscientious lawyers -- as distinguished from showing promise merely of being competent law students at a traditional law school.

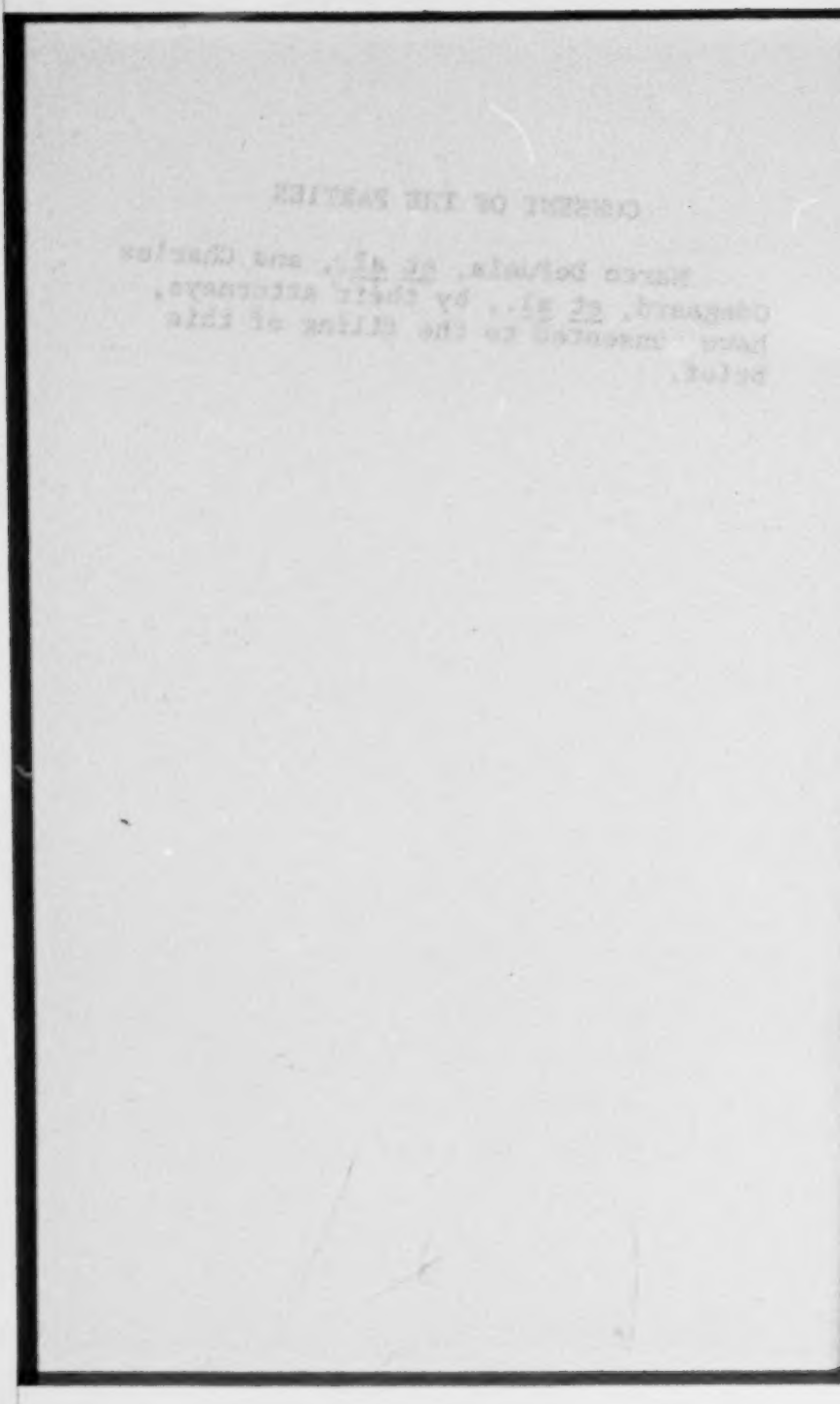
We believe it imperative that law schools not be restricted to standards and tests relating solely to and validated solely by reference to performance as a law student at a traditional law school. It is of the utmost importance to the Antioch School of Law that we not be prevented from focussing on potential for performance as a lawyer and Officer of the Court and that we be permitted to con-



tinue to consider different types of evidence in assessing the potential competence of different applicants.

CONSENT OF THE PARTIES

Marco DeFunis, et al., and Charles Odegaard, et al., by their attorneys, have consented to the filing of this brief.



QUESTION PRESENTED

Does a state supported school of law violate the Equal Protection Clause of the Fourteenth Amendment when its admission procedure provides that an applicant's racial or ethnic background may trigger the consideration of additional categories of evidence to assess potential competence as a student and potential contribution to the legal profession?

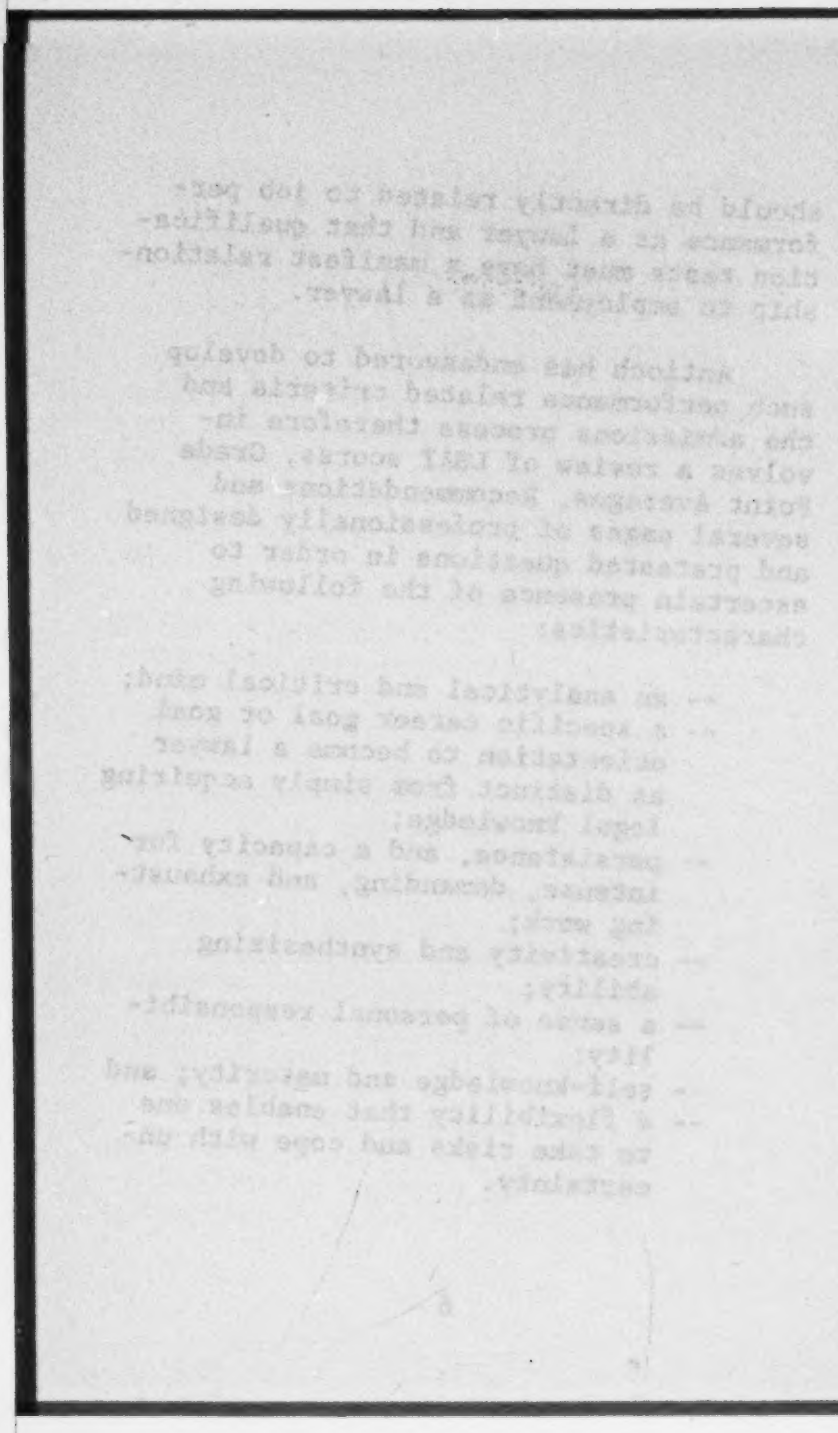
Admissions criteria for law school must be demonstrably related to those competencies, aptitudes and capabilities needed for performance as a lawyer.

A school of law is not solely a graduate school in law. It is a professional school responsible for training students who wish to enter the legal profession. Admission to an accredited law school is a prerequisite of admission to the bar in almost every state. The admissions process in fact constitutes a determination of eligibility to engage in the practice of law. Accordingly, admissions standards and procedures for entry into law school should be directly related to job performance, not solely as a graduate student in law but also as a potential lawyer and Officer of the Court. This view of the student as more than a graduate student in law is evidenced by the student practice rules or statutes adopted in over thirty-nine states. Accordingly, we interpret the principles laid down in Griggs v. Duke Power Co., 401 U.S. 424 (1971) as directly applicable to both the criteria and tests used in the process of law school admissions. We interpret that case as standing for the general propositions that educational or other requirements

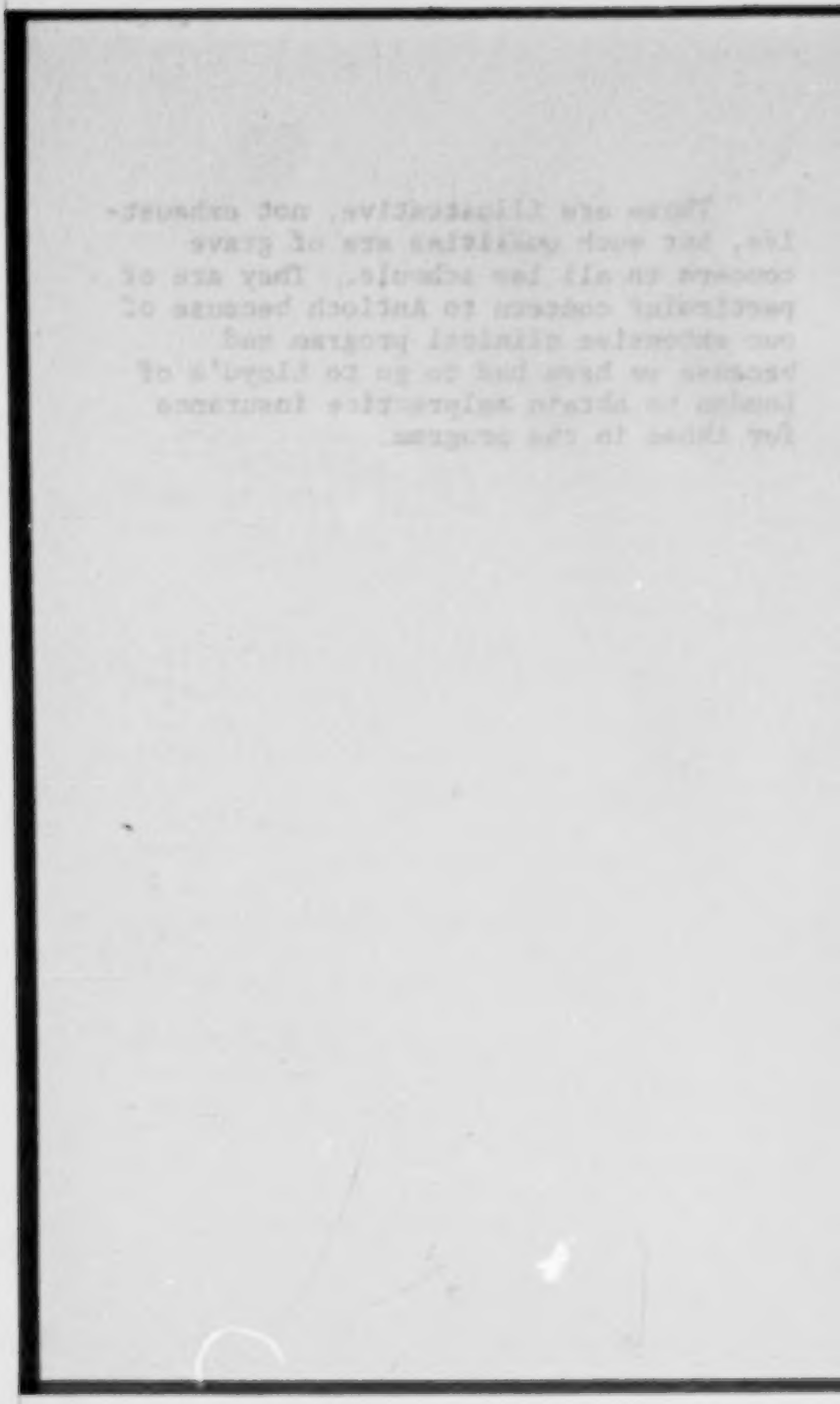
should be directly related to job performance as a lawyer and that qualification tests must have a manifest relationship to employment as a lawyer.

Antioch has endeavored to develop such performance related criteria and the admissions process therefore involves a review of LSAT scores, Grade Point Averages, Recommendations and several pages of professionally designed and pretested questions in order to ascertain presence of the following characteristics:

-- an analytical and critical mind;
-- a specific career goal or goal orientation to become a lawyer as distinct from simply acquiring legal knowledge;
-- persistence, and a capacity for intense, demanding, and exhausting work;
-- creativity and synthesizing ability;
-- a sense of personal responsibility;
-- self-knowledge and maturity; and
-- a flexibility that enables one to take risks and cope with uncertainty.



These are illustrative, not exhaustive, but such qualities are of grave concern to all law schools. They are of particular concern to Antioch because of our extensive clinical program and because we have had to go to Lloyd's of London to obtain malpractice insurance for those in the program.

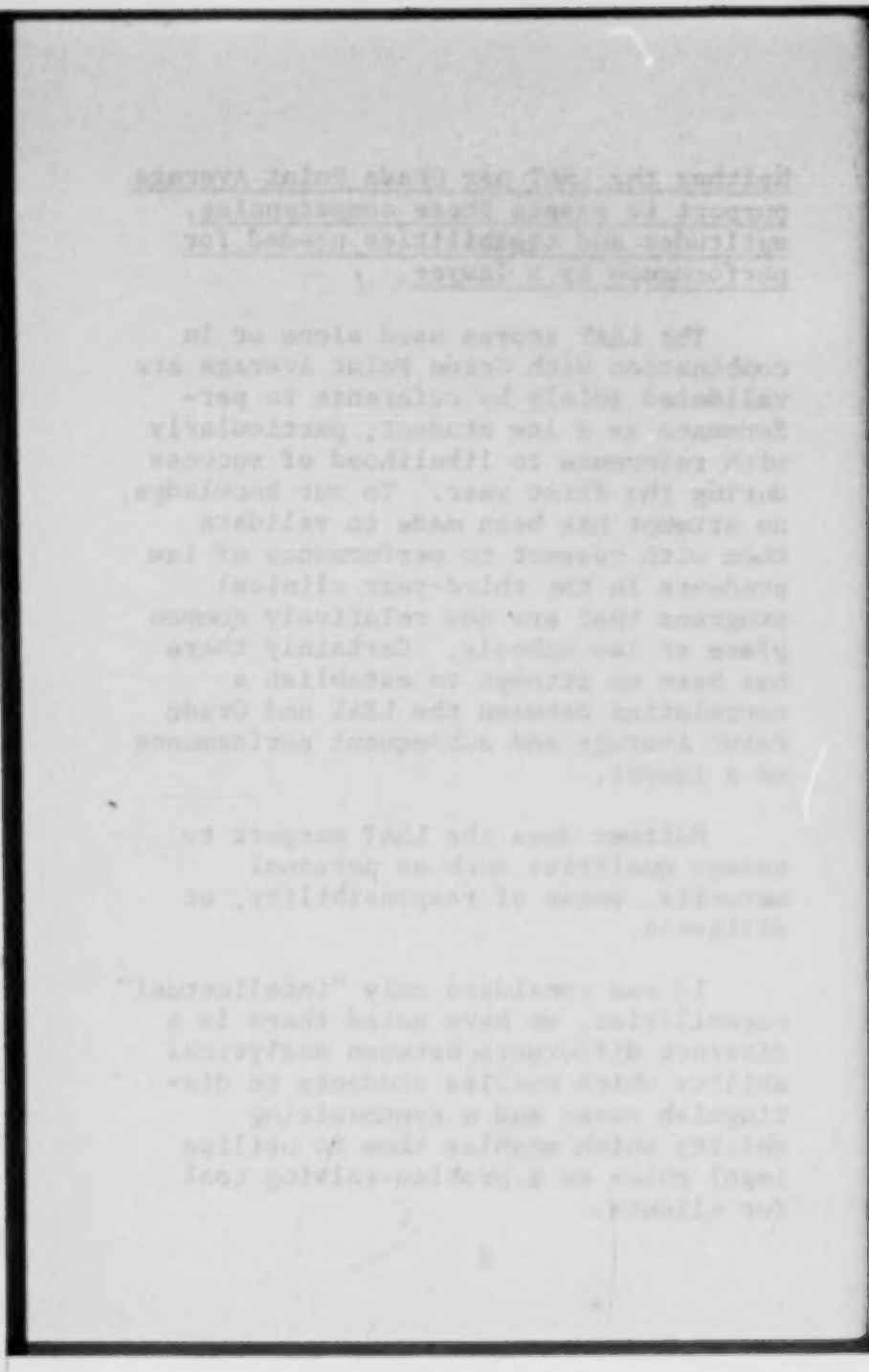


Neither the LSAT nor Grade Point Average purport to assess t.ose competencies, aptitudes and capabilities needed for performance as a lawyer.

The LSAT scores used alone or in combination with Grade Point Average are validated solely by reference to performance as a law student, particularly with reference to likelihood of success during the first year. To our knowledge, no attempt has been made to validate them with respect to performance of law students in the third-year clinical programs that are now relatively common place at law schools. Certainly there has been no attempt to establish a correlation between the LSAT and Grade Point Average and subsequent performance as a lawyer.

Neither does the LSAT purport to assess qualities such as personal maturity, sense of responsibility, or diligence.

If one considers only "intellectual" capabilities, we have noted there is a distinct difference between analytical ability which enables students to distinguish cases and a synthesizing ability which enables them to utilize legal rules as a problem-solving tool for clients.



In our professional judgment, a school of law would be guilty of discrimination on the basis of race, culture, class and (possibly) age if it relied upon the LSAT as the exclusive instrument to assess analytic ability or aptitude for the acquisition of professional competence.

We cannot rely upon the LSAT score as the single most valid indicator of potential ability to master legal concepts and legal analysis for two principle reasons:

1. The LSAT at best predicts ability to acquire legal concepts through one and only one pedagogic method -- the appellate case method as utilized universally and almost exclusively in the first year of law school.

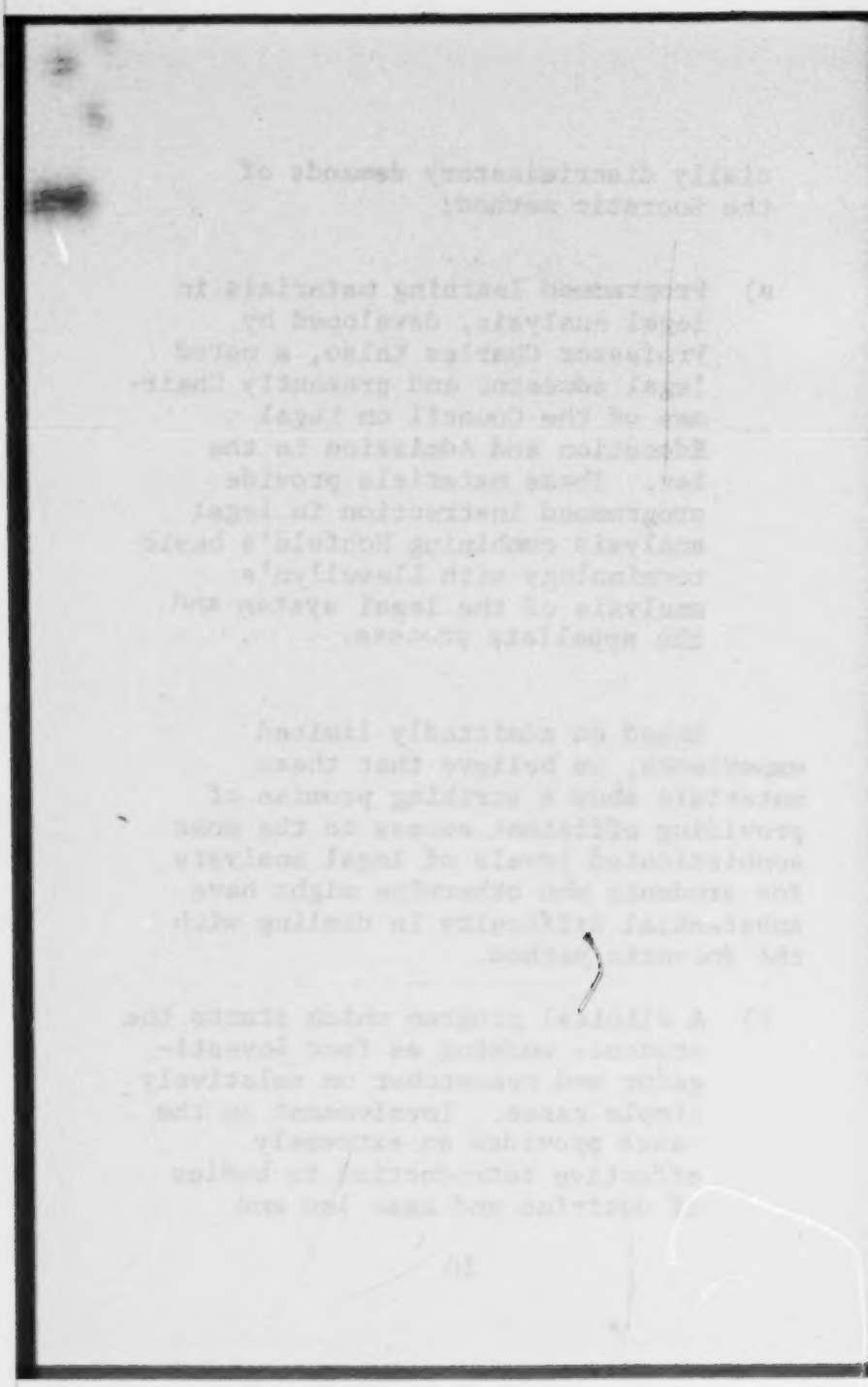
   The LSAT makes no claim of predicting ability to master legal concepts and the skills of legal analysis using educational methods other than the appellate case method. In addition to the appellate case method, Antioch uses two additional pedagogic techniques in order to minimize what we believe to be the non-functional and artifi-

cially discriminatory demands of the Socratic method:

a) Programmed learning materials in legal analysis, developed by Professor Charles Kelso, a noted legal educator and presently Chairman of the Council on Legal Education and Admission to the Bar. These materials provide programmed instruction in legal analysis combining Hohfeld's basic terminology with Llewellyn's analysis of the legal system and the appellate process.

Based on admittedly limited experience, we believe that these materials show a striking promise of providing efficient access to the most sophisticated levels of legal analysis for students who otherwise might have substantial difficulty in dealing with the Socratic method.

b) A clinical program which starts the students working as fact investigator and researcher on relatively simple cases. Involvement in the cases provides an extremely effective introduction to bodies of doctrine and case law and



provide very effective training in legal analysis, legal writing, legal research and advocacy in the context of providing service to a particular client in need of legal assistance.

2. The LSAT appears only to predict ability to acquire mastery of legal concepts through cognitive styles that are peculiarly race and class biased.

This assertion is in no way undermined by recent studies indicating that the LSAT is equally accurate as a predictor for black law students and white law students. All that it means is that blacks who cannot cope effectively with the LSAT will have difficulty coping with highly abstract symbol manipulation, with tasks lacking direct relevance, or with tasks requiring deferred gratification in terms of application to the real problems of people. Conversely, blacks who can cope with the LSAT's demands for performance (demands that we believe call for the cognitive styles of the white, upper middle class) are likely to be able to cope effectively with essentially similar demands made by the appellate case method. But that simply

raises the question of whether the appellate case method is not itself race and class biased when compared to other pedagogic methods such as programmed instruction or clinically based instruction.

We believe that the analytic skills traditionally taught by the appellate case method must be acquired. We only submit that there may be equally effective and alternate avenues to the same analytic precision.

The LSAT has been validated with respect to only one teaching method and one learning style.

Moreover, it is our observation that the LSAT does not give an adequate assessment of the potential of Native Americans or Latino applicants. It also appears that it discriminates against those who have been out of school for several years and who have grown rusty at test-taking.

In sum, we believe that exclusive or even primary reliance upon the LSAT may well result in an impermissably discriminatory admissions policy because the LSAT appears to have been:

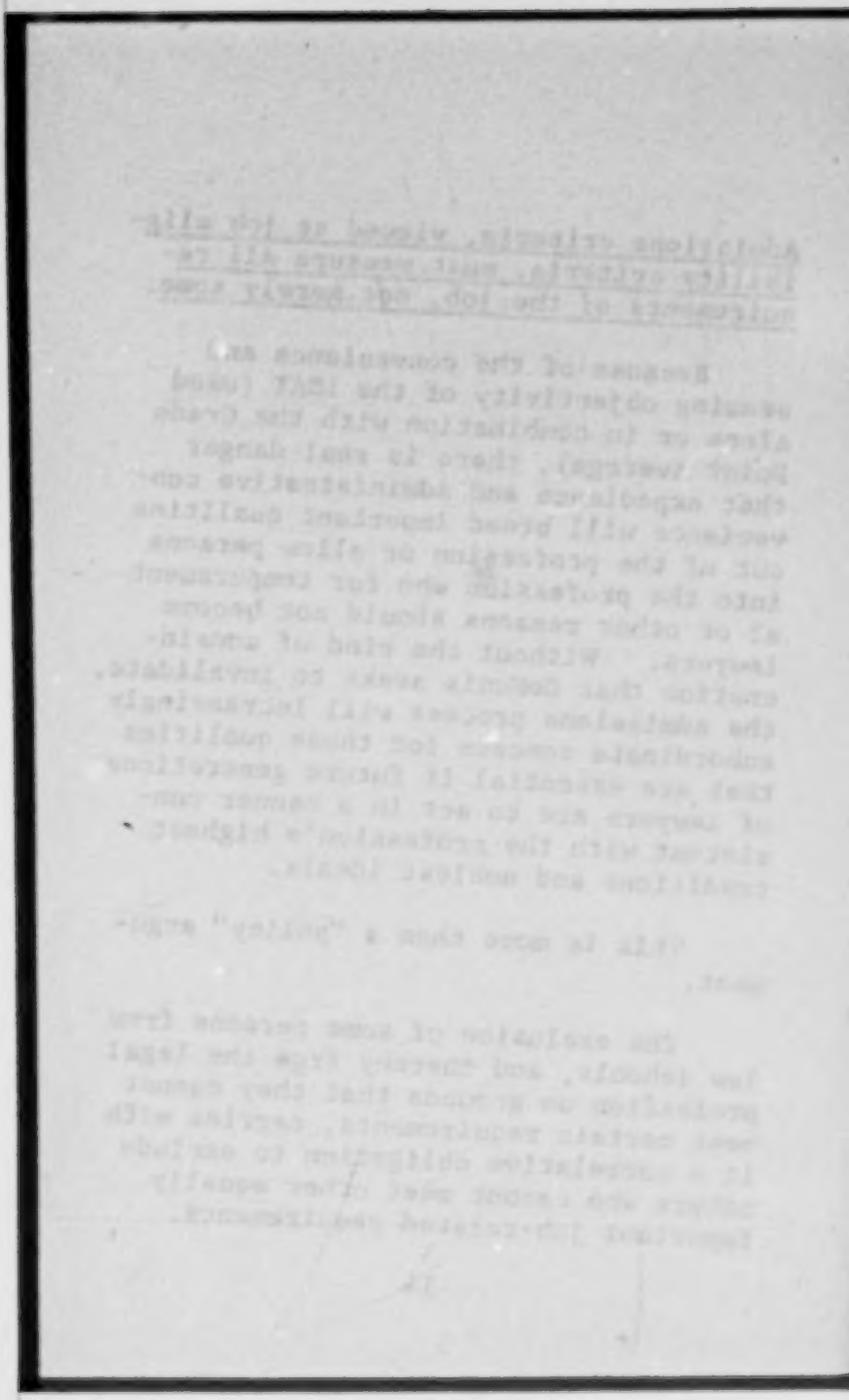
"... standardized primarily on and are relevant to a white middle class group of students [and]... produce[s] inaccurate and misleading test scores when given to lower class and Negro students." Hobson v. Hansen 269 F. Supp. 401, 514 (D.D.C. 1967), appeal dismissed, 393 U.S. 801 (1969).

Admissions criteria, viewed as job eligibility criteria, must measure all requirements of the job, not merely some.

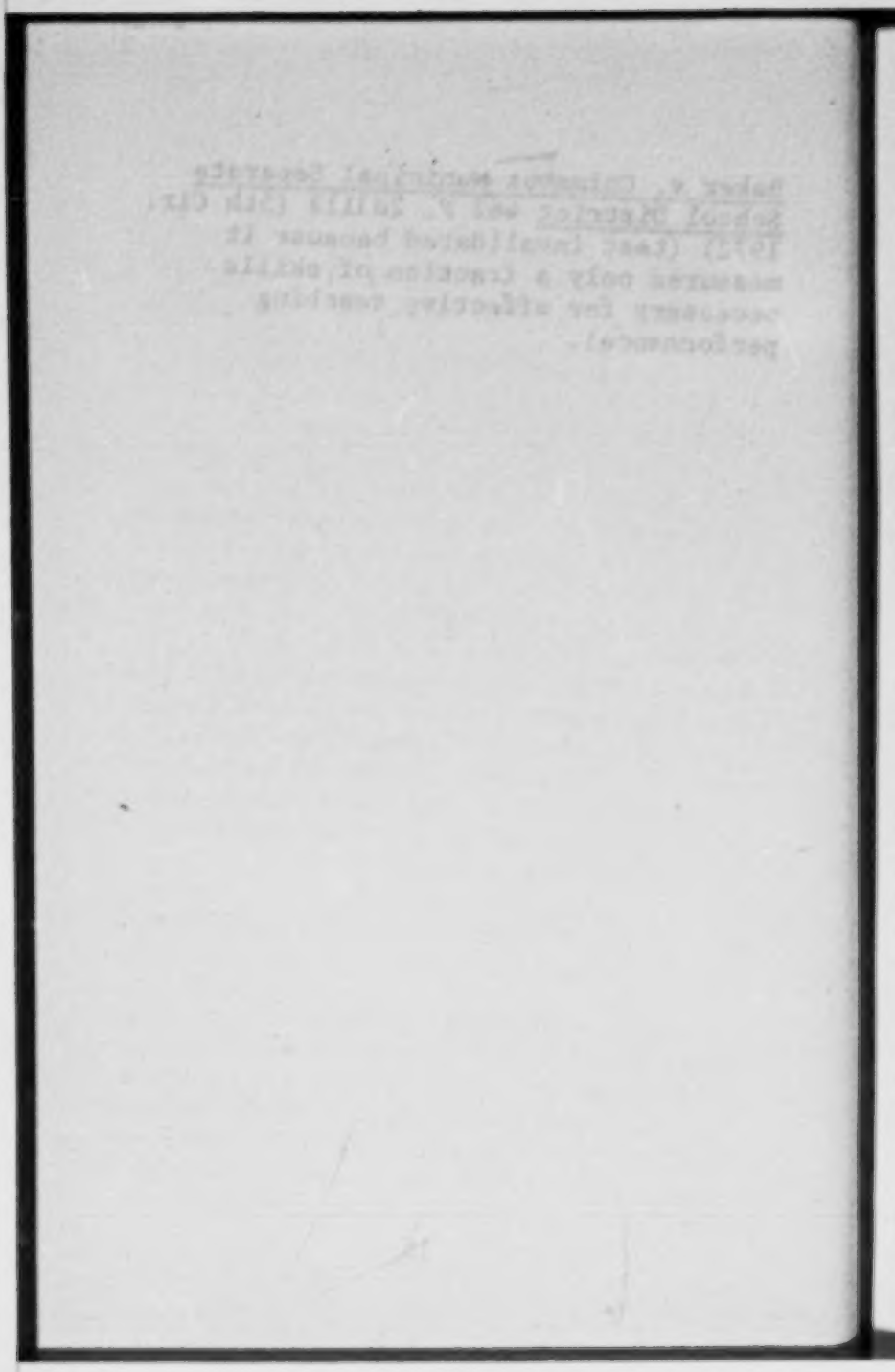
Because of the convenience and seeming objectivity of the LSAT (used alone or in combination with the Grade Point Average), there is real danger that expedience and administrative convenience will breed important qualities out of the profession or allow persons into the profession who for temperamental or other reasons should not become lawyers. Without the kind of consideration that DeFunis seeks to invalidate, the admissions process will increasingly subordinate concern for those qualities that are essential if future generations of lawyers are to act in a manner consistent with the profession's highest traditions and noblest ideals.

This is more than a "policy" argument.

The exclusion of some persons from law schools, and thereby from the legal profession on grounds that they cannot meet certain requirements, carries with it a correlative obligation to exclude others who cannot meet other equally important job-related requirements.



Baker v. Columbus Municipal Separate School District 462 F. 2d1112 (5th Cir. 1972) (test invalidated because it measured only a fraction of skills necessary for effective teaching performance).



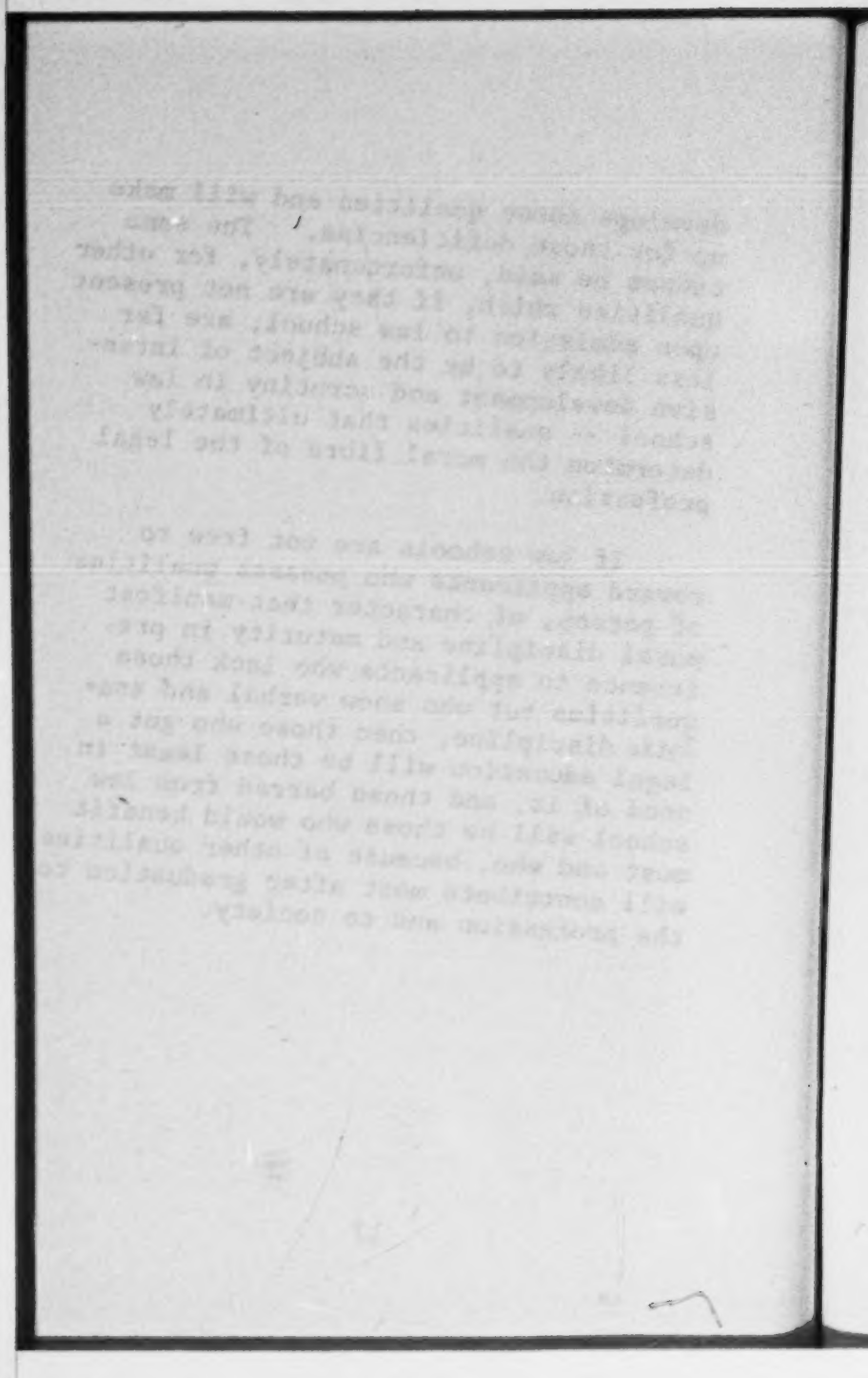
An admissions process would be arbitrary and capricious if it focussed exclusively on the possession of those competencies that are traditionally developed by law school training (e.g. analytic ability) and excluded or subordinated consideration of other qualities essential to the legal profession but which will not be the special focus of training and development in law school (e.g. problem solving skills, synthesizing ability, communications skills, self-knowledge, conscientious work habits, and sense of personal responsibility)

The admissions process that DeFunis would have law schools adopt would appear to reward with admission those who are least in need of three years of the kind of training that law schools traditionally offer but who may be most deficient in qualities which law schools do not purport to develop to the same degree (if at all) -- qualities of moral sensitivity, the sense of role, the conscientiousness over responsibility, and ability to communicate effectively with clients.

It would seem more logical to permit greater flexibility with respect to those qualities that the LSAT identifies since law school training preeminently

develops those qualities and will make up for those deficiencies. The same cannot be said, unfortunately, for other qualities which, if they are not present upon admission to law school, are far less likely to be the subject of intensive development and scrutiny in law school -- qualities that ultimately determine the moral fibre of the legal profession.

If law schools are not free to reward applicants who possess qualities of person, of character that manifest moral discipline and maturity in preference to applicants who lack those qualities but who show verbal and analytic discipline, then those who get a legal education will be those least in need of it, and those barred from law school will be those who would benefit most and who, because of other qualities, will contribute most after graduation to the profession and to society.



Our examination of the literature, meetings with consultants, and extensive inquiry during the planning process reveals that adequately validated instruments for determining whether an applicant possesses the full range of qualities, abilities, and aptitudes needed for the practice of law simply do not exist.

In planning the Antioch School of Law, we developed specific criteria and then canvassed the field intensively to see if we could not come up with tests or other measurement devices which would provide us with a more efficient and objective manner to determine the presence of certain qualities which we believed important to the profession. It suffices to say that we found none. And subsequent research, together with numerous discussions at recent meetings of the American Association of Law Schools and a review of research findings sponsored by the Law School Admissions Council lead us to conclude that there do not now exist the kind of rigorously validated instruments which will ascertain the existence and extent of development of the full range of qualities (or even an essential core of qualities and competencies) needed to be a lawyer.

Antioch is seeking to implement an experimental demonstration and research project which will:

1. review and revise admissions criteria and procedures to improve our ability to predict the potential performance of the applicants as future lawyers;

2. correlate predictions of lawyering potential made in the admissions process with actual performance of lawyering tasks by students in the clinical program;

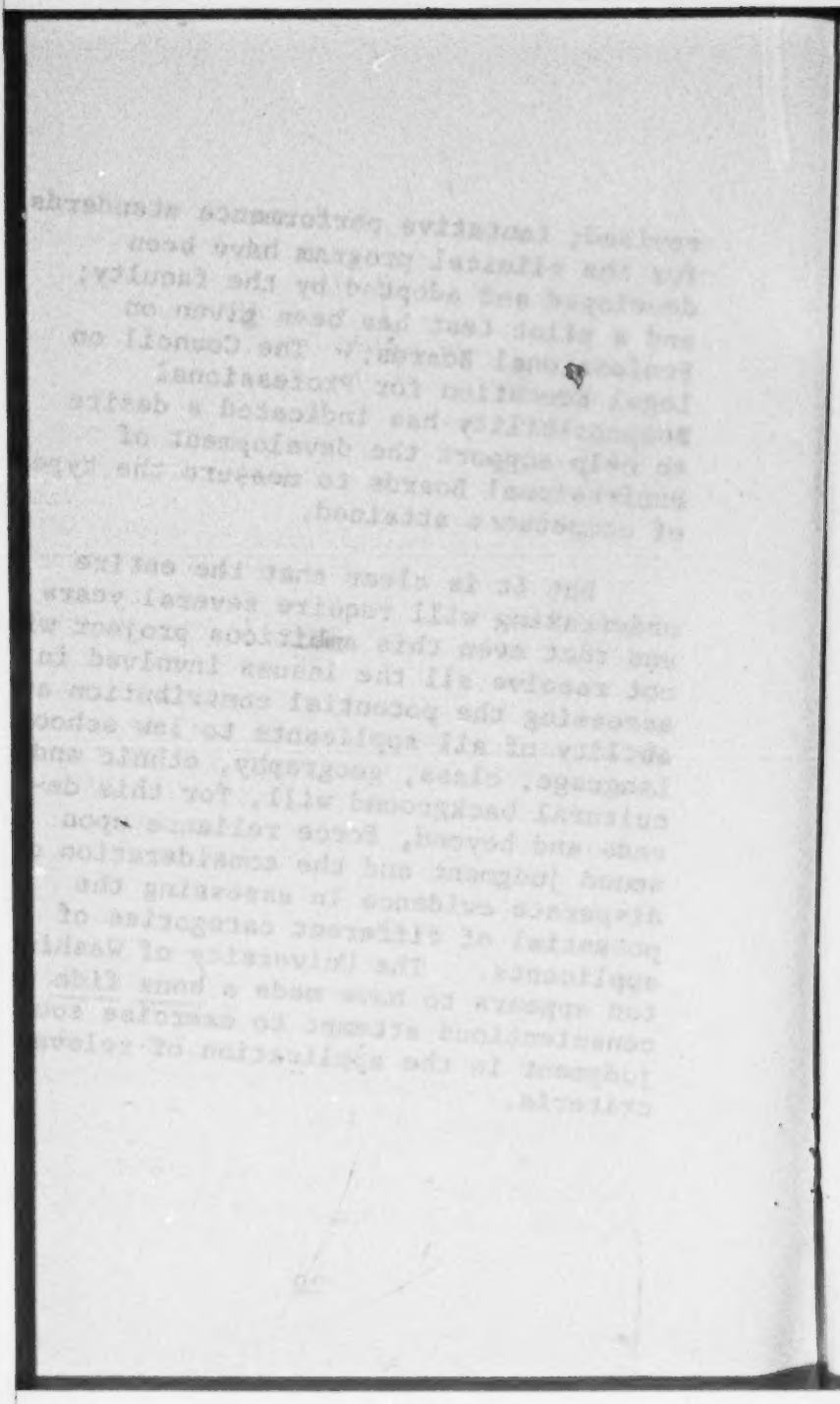
3. develop "Professional Boards" utilizing simulated cases to test competency in specific lawyering skills such as interviewing, writing memoranda, drafting pleadings, taking depositions, negotiating for settlement, direct examination and cross examination of witnesses; and

4. develop performance criteria for clinical work establish greater correlation between admissions decisions, clinical performance and performance on "Professional Boards."

The experiment is just in its beginning phases: admissions forms have been

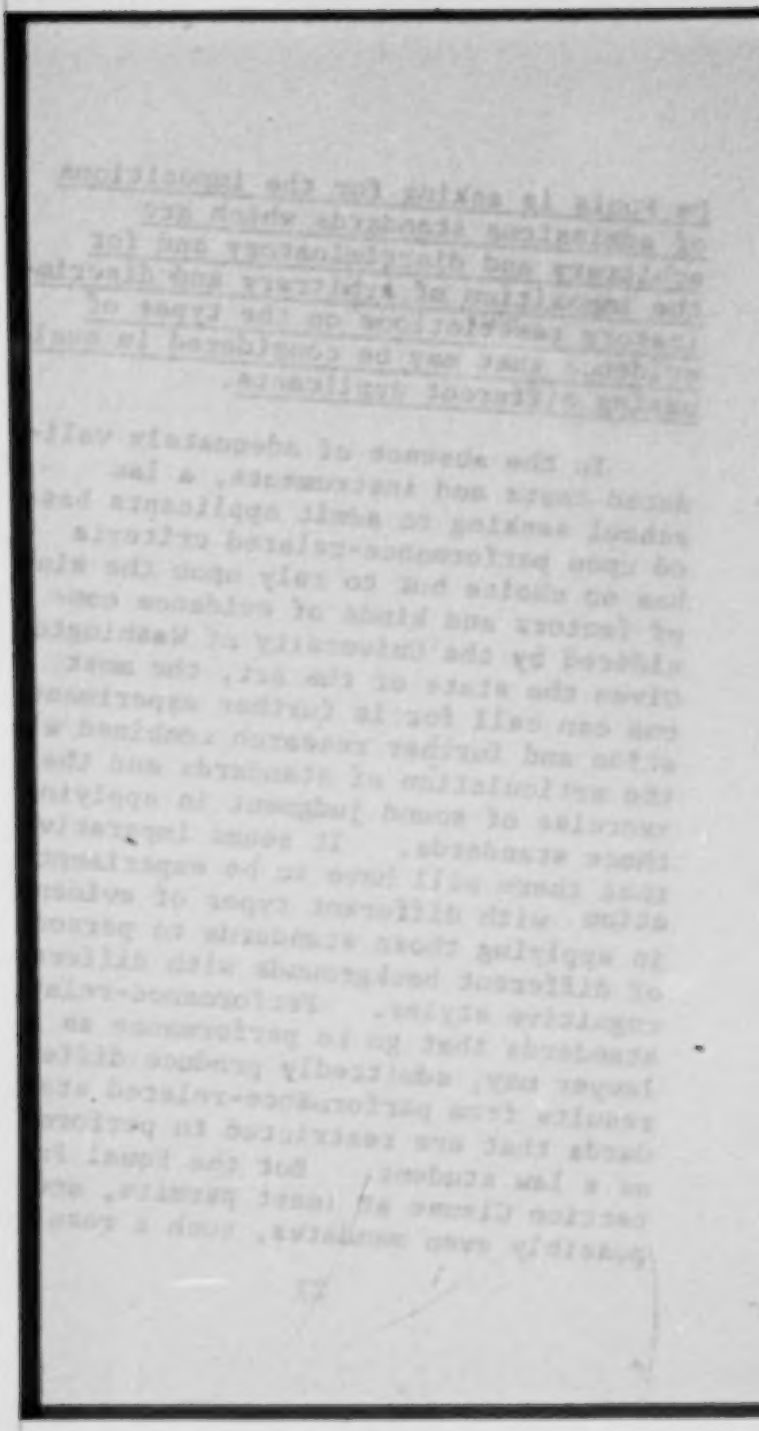
revised; tentative performance standards for the clinical program have been developed and adopted by the faculty; and a pilot test has been given on Professional Boards. The Council on Legal Education for Professional Responsibility has indicated a desire to help support the development of Professional Boards to measure the types of competence attained.

But it is clear that the entire undertaking will require several years and that even this ambitious project will not resolve all the issues involved in assessing the potential contribution and ability of all applicants to law school. Language, class, geography, ethnic and cultural background will, for this decade and beyond, force reliance upon sound judgment and the consideration of disparate evidence in assessing the potential of different categories of applicants. The University of Washington appears to have made a bona fide and conscientious attempt to exercise sound judgment in the application of relevant criteria.



De Funis is asking for the impositions of admissions standards which are arbitrary and discriminatory and for the imposition of arbitrary and discriminatory restrictions on the types of evidence that may be considered in evaluating different applicants.

In the absence of adequately validated tests and instruments, a law school seeking to admit applicants based upon performance-related criteria has no choice but to rely upon the kinds of factors and kinds of evidence considered by the University of Washington. Given the state of the art, the most one can call for is further experimentation and further research combined with the articulation of standards and the exercise of sound judgment in applying those standards. It seems imperative that there will have to be experimentation with different types of evidence in applying those standards to persons of different backgrounds with different cognitive styles. Performance-related standards that go to performance as a lawyer may, admittedly produce different results from performance-related standards that are restricted to performance as a law student. But the Equal Protection Clause at least permits, and possibly even mandates, such a result.



CONCLUSION

For the reasons stated above the Amici asks that the judgment below be affirmed.

Respectfully submitted:

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